IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 17A

WCC No. 2000-0249

HARRY DARRAH

Petitioner

vs.

ASARCO, INCORPORATED

Respondent/Insurer/Employer.

ORDER GRANTING RECONSIDERATION, VACATING TRIAL, AND SCHEDULING A CONFERENCE WITH COUNSEL

Case summary: In an earlier Order the Court ordered that an expert vocational witness for claimant be stricken for claimant's failure to comply with the Court's Scheduling Order requiring disclosure not only of the expert's name but the substance and basis for the expert's opinions, and also limited a physician's opinion testimony to that which was disclosed in his records. Claimant moved for reconsideration.

Held: Reconsideration **granted**. Upon reviewing case law, the Court has determined that the remedy was too harsh under the circumstances. The trial is vacated to allow for proper disclosure.

Topics:

> **Discovery: Experts.** Parties must comply with the Court's requirement in its scheduling orders for automatic disclosure of expert witnesses and the substance and bases of their opinions.
>
> **Discovery: Experts.** Where the general nature of the testimony of an expert witness should be obvious, and the party objecting to use of expert testimony (because disclosure regarding the opinions was insufficient) failed to move to compel further disclosure, the appropriate remedy is to vacate the trial and order adequate disclosure.

¶1 On April 20, 2001, this Court entered an Order Striking Witnesses. The Order precluded vocational testimony by the claimant's vocational expert and limited testimony of a treating physician to those opinions expressed by the physician in records provided to the

respondent. I entered the Order on account of the claimant's failure to disclose expert opinions, as well as the facts and grounds upon which the opinions are based. That disclosure was required by the Court's Scheduling Order.

¶2 Claimant moves for reconsideration and requests oral argument. The request for oral argument is denied since I do not believe argument would further clarify the matter. The motion for reconsideration, however, is granted.

Discussion

¶3 I begin my discussion of the motion by pointing out and underlining my expectation that counsel appearing in cases before this Court will cooperate in preparing cases for trial. I expect full and honest communication between counsel. The rules of this Court, and the requirements set forth in its scheduling order are intended to provide a fair playing field. They are not intended to provide parties with pistols or swords for dueling. On the other hand, I expect compliance with the rules.

¶4 Counsel in this case are not in synch with the Court. As evidenced by the motion and briefs regarding summary judgment, and the objections in another case in which they dueled, *Dale Aaby v. ASARCO,* WCC. No. 2001-0101, neither counsel seems able to meet the deadlines and requirements of the Court's rules. Morever, it is apparent that counsel are not communicating, rather they are relying on every technical advantage the rules and scheduling orders can provide them. Claimant's reliance on my rulings in *Aaby* in support of his arguments for reconsideration, only exemplifies the confrontational nature of counsels' relationship and their inability to comply with Court rules. I would like to take both counsel to the woodshed, but higher Court decisions regarding corporal punishment prohibit me from doing so.[(1)]

¶5 In my Order Striking Witnesses, I determined that claimant failed to provide essential information concerning his expert witnesses. Disclosure of expert witness' opinions is required by the Court's scheduling orders; it is automatic, it does not depend on discovery requests. The requirement of automatic disclosure is based upon several factors. First, the amount of time between the filing of a petition and the time of trial is short, ordinarily 75 days. Prompt disclosure of expert opinions is therefore important to trial preparation. Second, expert testimony in cases coming before the Court is common and frequent. Many of the issues presented for decision involve either expert vocational testimony or expert medical opinion. The automatic disclosure requirement assures that information regarding expert witness testimony is timely disclosed.

¶6 Claimant's attorney argued in response to the respondent's original motion to exclude witnesses that it is his experience that attorneys do not strictly comply with the Court's disclosure requirements. In his original response to the motion to strike expert witnesses, he argued:

> Petitioner's counsel has never received an objection from opposing counsel for the way he has disclosed expert witnesses in the past, in the many cases in which he has represented client before the Workers' Compensation Court. Had Respondent wanted additional information, he could have requested that counsel expand on the disclosure, submitted interrogatories requesting the information, or taken the depositions of the named witnesses . . . Petitioner's counsel would make every effort to cooperate with Respondent for the scheduling of such depositions.

(Petitioner's Response to Motion to Strike Expert Testimony at 1.) I find the argument disingenuous. In *Aaby,* which Mr. Grosfield cites as authority contradicting my original ruling striking his witnesses, he sought to exclude a physician's record because it was not listed in ASARCO's disclosure. I overruled the objection, but only because the record had in fact been provided to Mr. Grosfield prior to the disclosure date and the disclosure listed the doctor as a witness, thus he had ample notice of the information intended to be offered at trial. His technical objection in that case, as well as his motion to strike ASARCO's first motion for summary judgment because it was three days late, shows he is intent upon invoking every technicality of the Court's rules and orders if they work to his advantage. He can hardly complain that the other side replies in kind when he fails to adhere to the Court's rules and scheduling order.

¶7 However, upon reviewing case law, I conclude that my prior order was too harsh. My conclusion is based upon my review of the following cases: *Montana Power Co. v. Wax,* 244 Mont. 108, 796 P.2d 565 (1990); *Scott v. E.I. Dupont De Nemours & Co.,* 240 Mont. 282, 783 P.2d 938 (1989); and *Sikorski v. Olin,* 174 Mont. 107, 568 P.2d 571 (1977). These cases deal with deficiencies in answers to interrogatories requesting information about testimony of witnesses. While the present case does not involve an interrogatory, the order for disclosure of expert witness information is the equivalent to an automatic, Court propounded interrogatory, therefore, I find the discussion in these cases apropos.

¶8 In *Montana Power,* which was a condemnation action,[(2)] the Supreme Court upheld a district court order excluding testimony concerning property values because of defendants' failure to provide information concerning the witnesses' basis for valuation. The defendants had been served with interrogatories asking them to identify experts and to state the "nature and subject matter of the[ir] advice, opinion, study . . . ." 244 Mont. at 111, 796 P.2d at 566-67. The defendants identified two witnesses who "will render opinions as to the highest and best use of the subject property, the value of the property and the diminution of value of the properties not actually taken by eminent domain." *Id.* At trial Montana Power objected to the opinions because the "basis for the opinions was not set forth in the answers . . . ." 244 Mont. 15 112, 796 P.2d at 565. The trial judge sustained the objection and the Supreme Court affirmed, finding that the trial judge acted within his discretion:

> The answers to interrogatories clearly do not reveal any basis for the witnesses' valuation of just compensation. Nor do they offer any insight into how these witnesses would arrive at before-taking and after-taking valuation of the properties. The trial court could therefore exclude the testimony without abusing its discretion. . . .

Id. *Montana Power* plainly supports this Court's original order excluding expert witnesses.

¶9 However, in *Scott* the Supreme Court affirmed a trial judges' refusal to exclude expert witness testimony even though the answers to expert witness interrogatories were deficient. That case involved a strict liability claim based on inhalation of paint fumes. The plaintiff propounded an interrogatory "asking the names of experts who would testify at trial, the opinions of the experts, and the factual bases for the opinions." 240 Mont. at 286, 783 P.2d at 941. The answer identified an expert -- Bruce J. Held -- in industrial hygiene and respirators. The answer further indicated the expert would testify about the effectiveness of a particular respirator [presumably worn by the plaintiff] and "the requirements of [a] proper respirator program required of employer." *Id*. No further information was provided. Plaintiff moved to exclude Held's testimony. The trial judge denied the motion and was affirmed on appeal:

> Held's testimony at trial was within the subject matter indicated in the answers to interrogatories. While the answers were not as complete as they should have been, Held was not a surprise witness. The above answers to interrogatories were made over three years prior to trial. Scott did not move to compel further answers. The time elapsed lessens the importance of these inadequate answers. We do not condone defendant's failure to provide full and complete answers to interrogatories. However, refusing to allow Held to testify would have been an extreme sanction, given that defendant's offense was incompleteness in its answers to interrogatories, not failure to answer. We hold that the lower court did not err in permitting Held to testify.

240 Mont. at 286-87, 783 P.2d at 941.

¶10 *Sikorski* did not involve an expert witness interrogatory. The action was brought by a sales representative of the defendant for breach of contract. The interrogatory in question concerned the parties' contractual relationship. The plaintiff was allowed to amend his answer to the interrogatory on the day of trial. Recitation of the specific facts of the case is unnecessary here. What is important to the issue at hand is the Supreme Court's determination that the defendant was not prejudiced by the amendment since it was already aware of the nature of the testimony that plaintiff intended to offer at trial and did not request a continuance. Its discussion is instructive:

> Rule 33, M.R.Civ.P. authorizes use of interrogatories for the purpose of pretrial discovery from an adverse party. This rule is liberally construed to make all relevant facts available to parties in advance of trial, and to reduce the possibilities of surprise and unfair advantage. *Wolfe v. Northern Pacific Ry. Co.*, 147 Mont. 29, 409 P.2d 528 (1966).
>
> However, failure to properly answer certain interrogatories will not be deemed in every case to effect censure of material which should rightfully be developed in a trial on the merits. A detailed statement of the applicable rule and corresponding reasoning appears in *Wolfe v. Northern Pacific Ry. Co., supra:*
>
> > " * * * Even though under Rule 37 sanctions may be imposed upon a party who fails to comply with the discovery requirements of the rules, and specifically upon a party who fails to properly answer his interrogatories, necessarily it must lie within the authority of the trial judge to determine from the circumstances of each case what constitutes compliance and noncompliance and to determine what sanctions, if any, are to be imposed. A strict rule of exclusion could in many instances defeat the desired goal of a decision on the merits. Such a misfortune, we feel, may be avoided if we heavily rely upon the watchful eye of the trial judge whose vision normally is focused upon the delicate balance which weighs the server's right to demand answers to his interrogatories and the extent of the adverse party's compliance. In interpreting these rules we will reverse the trial judge only when his judgment may materially affect the substantial rights of the appellant and allow a possible miscarriage of justice." 147 Mont. 29, 40-41, 409 P.2d 528, 534.
>
> We note, in reviewing the claims of surprise and unfair advantage, that Sikorski's complaint sets forth the same precise contractual terms as to duration and remuneration for sales as were subjected to proof at trial. Moreover, testimony of Olin established he had made certain contractual promises to Sikorski, specifically regarding compensation for improvements. It is clear the central issues of the case were formulated well in advance of trial, and Olin and Rolin had knowledge of all facts responsive to Sikorski's claims at trial. Hence, any surprise or prejudice to Olin and Rolin in this regard was minimal, at most. Moreover, by not requesting a continuance after the trial judge granted the right to amend the interrogatory, Olin and Rolin waived any right to claim error on appeal. *Spencer v. Robertson*, 151 Mont. 507, 445 P.2d 48 (1968); 17 C.J.S. Continuances s 13.

174 Mont. at 110-11, 568 P.2d at 573.

¶11 The lessons I draw from these three decisions are as follows:

- Whether or not to exclude the testimony is within the sound discretion of the trial judge.
- Exclusion of testimony is an extreme sanction which should be granted only if necessary to preserve a fair trial for the opponent of the testimony.
- In determining whether to exclude testimony based upon a failure to properly and fully answer an interrogatory, the Court must consider whether the proposed testimony is surprising and would put the party opposing the testimony at an unfair disadvantage.
- The opportunity to move to compel more detailed answers should be considered in deciding whether to exclude the testimony.

¶12 After considering the above guidelines, I conclude that I wrongly ruled that the expert testimony proposed by claimant should be excluded. The facts leading me to this conclusion are as follows:

- ASARCO's attorney could have picked up the telephone and asked for more information regarding claimant's expert witnesses, or sought to depose the experts, or moved to compel further answers. He could have moved to continue the trial to a later date if need be. Both counsel in this case are experienced practitioners. They are well aware that the Court bends over backwards to accommodate requests for special settings of trials. Indeed, the trial setting in this case is a special setting at the request of claimant's counsel.
- While the specifics of the proposed vocational testimony may not have been evident, the general nature of claimant's vocational testimony should have been evident. Vocational testimony in this Court is common and follows a pattern. With respect to the medical testimony, ASARCO had the doctor's reports. If he testifies differently from the reports, he can be impeached.

ORDER

¶13 The claimant's motion for reconsideration is **granted**. The Court's prior Order Striking Witnesses is **rescinded**.

¶14 The trial setting of May 22, 2001, is vacated. This matter will be reset for the next regular Helena term of Court.

¶15 Counsel are ordered to appear for a conference with the Court in Missoula at 1:00 p.m., Thursday, May 17, 2001, at the offices of Martin-Lake Court Reporters, 111 North Higgins, Suite #500, Missoula, Montana, to discuss further proceedings in this case.

DATED in Helena, Montana, this 8th day of May, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Todd A. Hammer
Submitted: May 3, 2001

1. This is meant humorously. I would not even footnote this but for the fact that many statements are construed literally, without regard to context, and without humor.

2. The utility sought an easement.